IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4523

UPMC PRESBYTERIAN SHADYSIDE,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

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APPELLANTS' REPLY BRIEF

On Appeal from the United States District Court for the Western District of Pennsylvania
Nos. 2:14-mc-00109, 2:14-mc-00110, 2:14-mc-00111

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UPMC,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Nos. 14-4525

UPMC,
Appellant,

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INTRODUCTION

Tellingly, the NLRB's response brief largely fails to address the central issue on appeal: whether the District Court erred in ruling that it lacked authority to review the NLRB's subpoenas because it was "constrained to essentially 'rubber stamp' the enforcement of" those subpoenas. JA31.

Appellants UPMC and UPMC Presbyterian Shadyside (collectively, "Appellants") file this short reply to address three points: (1) the NLRB's mischaracterization of the District Court's decision only underscores why that decision cannot stand; (2) the District Court erred in its application of the law; and (3) this Court should defer to the District Court's factual findings and deny enforcement on that basis, or, in the alternative, remand for the District Court to make more detailed findings on these points.

ARGUMENT

I. THE NLRB'S MISCHARACTERIZATION OF THE DISTRICT COURT'S DECISION ONLY UNDERSCORES WHY THAT DECISION CANNOT STAND.

The NLRB's response to Appellants' opening brief makes perfectly clear that dispositive to this appeal is what the District Court did and did not decide. The NLRB works hard to convince this Court that the District Court ordered enforcement through a proper application of its factual findings to this

Circuit's law. *See, e.g.*, NLRB Br. at 2 ("the District Court concluded that the subpoenas met the standard for enforcement as articulated by this Court and ordered enforcement"); *id.* at 12 ("the District Court correctly concluded that when applying the appropriate standard articulated by this Court, the Board satisfied the necessary requirements for enforcement of its subpoenas"); *id.* at 22 n.19 ("the Court ultimately concluded that application of this Court's standard for enforcement required the subpoenas to be enforced"); *id.* at 31 ("While the District Court's opinion is unconventional, the Court considered the facts and ultimately applied the appropriate law in finding the subpoenas met the appropriate standard of review as established by this Court.").[1]

Although the NLRB's attempt to characterize the District Court's opinion as it does is understandable—because otherwise the opinion is indefensible—its characterization is just plain wrong. In fact, the District Court did precisely the opposite of what the NLRB says it did: it held that applying its factual findings to this Circuit's law, it would ***not*** enforce the subpoenas. The Court could not have been clearer:

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[1] The NLRB's attempt to defend what the District Court did through word games about "merely" and "essentially" should be rejected out of hand. *See* NLRB Br. at 29-31. Appellants did not "distort" the District Court's opinion, much less "gross[ly]" so.

> Thus, based upon the current record and applying the applicable "test" (regarding whether the inquiry is relevant to a legitimate purpose and whether the demand is unreasonably broad and burdensome), ***the Court would deny*** the three (3) Applications to Enforce Subpoenas Duces Tecum in their current form.

JA29-30 (emphasis added).

The Court then went on to discuss this Court's *Kronos* decisions, determining that, "[t]his Court's experience with the *Kronos* matter and its subsequent appellate history, leads this Court to believe that it is constrained in the current case, in that any denial of the present Applications to Enforce Subpoenas will not be affirmed." JA31. As the Court described its "Current Legal Predicament," JA31, "the practical effect of case law as to enforcement of subpoenas of federal government agencies is that the Court is constrained to essentially 'rubber stamp' the enforcement of the Subpoenas at hand." JA31.

So, the Court concluded, "[i]f the practical effect of this legal predicament is to be altered, it is not the District Court's role to do so, but the role of the appellate court. . . . If the United States Court of Appeals for the Third Circuit finds that the District Court has the authority to conduct a meaningful and/or thorough review of the three (3) Subpoena Duces Tecum at issue here, the Court is prepared to do so." JA32.

This Court should make clear that the *Kronos* decisions did not alter

the long-standing precedent for enforcement of federal agency subpoenas, reverse the District Court's judgment, and deny enforcement based on the District Court's existing factual findings or, in the alternative, accept the District Court's invitation and remand for that Court to conduct a more detailed review of the subpoenas.

II. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE LAW.

The NLRB argues that "the District Court's discussion of *Kronos I* and *II* does not reveal a misapplication of the law in this case, but a concession that it was governed by this Court's *Kronos* decisions." NLRB Br. at 26. There is no question that the District Court "conced[ed]" it was bound by the *Kronos* decisions. The question is whether the District Court properly interpreted and applied those decisions.

As set forth in Appellants' opening brief, this Court's opinions in the *Kronos* cases did not alter Circuit precedent for enforcement of agency subpoenas, nor could they. *See* Appellants' Br. at 22-27; 3d Cir. I.O.P. 9.1. The District Court incorrectly thought that *Kronos* stripped it of authority to conduct a "meaningful review" of agency subpoenas, instead requiring that such subpoenas be "rubber stamp[ed]." Yet, as the NLRB itself acknowledges, the *Kronos* decisions did no such thing. *See* NLRB Br. at 28-29.

Where this leaves the matter is that, based on what the NLRB admits

is an incorrect interpretation of the *Kronos* decisions, the District Court disregarded its own factual findings and "rubber stamped" enforcement of the subpoenas. And it did so despite its conclusion that, under what the NLRB admits is the correct legal standard, the subpoenas should not have been enforced. Thus, the District Court plainly misapplied the law in enforcing the subpoenas. Its decision requires reversal on that basis alone.

III. THIS COURT SHOULD DEFER TO THE DISTRICT COURT'S FACTUAL FINDINGS AND DENY ENFORCEMENT, OR, IN THE ALTERNATIVE, REMAND FOR THE DISTRICT COURT TO MAKE MORE DETAILED FINDINGS.

Despite its assertion that the District Court properly applied the law to the facts in enforcing the subpoenas, NLRB Br. at 11, 22 n.19, 31, the NLRB goes on to challenge the factual findings the District Court made. NLRB Br. at 14-25. However, the NLRB provides no basis on which to disturb those findings. Thus, if this Court concludes (as it should) that *Kronos* did not change the standard for enforcement of agency subpoenas, the Court should reverse the District Court and enter judgment denying enforcement.[2]

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[2] Contrary to the NLRB's contention, there is no inconsistency in Appellants' argument. NLRB Br. at 29 n.26. Given the District Court's factual findings, this Court could reverse on the existing record. However, should the Court conclude that the District Court abrogated its duty by acting "essentially" as

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In an attempt to distance itself from the District Court's factual findings, the NLRB argues that because this Court "reviews judgments, not statements in opinions," this Court need not concern itself with anything in the District Court's opinion except its actual judgment. NLRB Br. at 15-16. Needless to say, the cases that the NLRB cites for that startling proposition say no such thing. Rather, those cases simply recite the basic principle of appellate practice that a party who receives all of the relief that it requested from the district court's judgment is not an aggrieved party for purposes of appeal based simply on unfavorable language in the court's opinion.[3]

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a "rubber stamp," the remedy is a remand for the District Court to conduct the requisite meaningful review. *See* Appellants' Br. at 27-32.

[3] *See California v. Rooney*, 483 U.S. 307, 311 (1987) (dismissing writ of *certiorari* as improvidently granted because lower court judgment was entirely in the petitioner's favor); *Jennings v. Stephens*, 135 S. Ct. 793, 798-99 (2015) (party who receives all the relief he requested not required to cross-appeal lower court's opinion rejecting one of his theories); *Livornese v. Med. Protective Co.*, 136 F. App'x 473, 481 n.8 (3d Cir. 2005) (not precedential) (district court imposed no actual liability despite preliminary determination in opinion, so there was nothing for appellate court to review); *In re Wingerter*, 594 F.3d 931, 942 (6th Cir. 2010) (Rogers, J., dissenting) (party lacked injury required to confer standing in bankruptcy appeal because judgment was entered in party's favor); *Peanick v. Morris*, 96 F.3d 316, 322 (8th Cir. 1996) (court able to affirm on alternative ground regardless of whether ground was argued by a party or considered by the district court); *United States v. Taylor*, 777 F.3d 434, 443-44 (7th Cir. 2015)

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Moreover, the "statements" to which the NLRB refers are hardly passing comments or *dicta*: they are actual factual findings to which this Court owes considerable deference. *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007) (reviewing district court's factual findings underlying subpoena enforcement decision for clear error); *United States v. Lessner*, 498 F.3d 185, 199 (3d Cir. 2007) (finding of fact is clearly erroneous only if the Court is "left with a definite and firm conviction that a mistake has been committed"). The District Court made such findings as to each element the NLRB was required to satisfy in order to obtain enforcement of the subpoenas. This Court should defer to those findings.

First, this Court should defer to the District Court's finding that the subpoenas were issued for an improper purpose, specifically, that they effectively transformed the NLRB from an "enforcer of federal labor law" to a "litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union." JA23-24; *see* JA67 (noting that Appellants' reconsideration motion presented "substantial evidence" of the NLRB's improper purpose). The NLRB first challenges this finding by arguing that Appellants presented no evidence of the NLRB's improper purpose. Not so. Appellants presented evidence showing that

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(declining to review aspect of district court's oral ruling that was not reduced to judgment).

the Union orchestrated the City of Pittsburgh's payroll tax lawsuit and that on the same day that the City filed a brief arguing that UPMC was a "single employer" for purposes of the NLRA, counsel for the NLRB informed UPMC's counsel that the NLRB had reversed its position and now intended to amend its complaint to include single employer allegations. *See* Appellants' Br. at 11-12.[4]

The NLRB further argues that Appellants' evidence that the NLRB issued the subpoenas to assist the Union in the payroll litigation can be considered only by the NLRB itself in its own proceedings, not by the District Court. NLRB Br. at 19 n.18. The NLRB is wrong. "[E]nforcement of a subpoena for an improper purpose constitutes an abuse of the court's process and can be raised as a

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[4] Given the suspicious timing of these two events, Appellants' reconsideration motion requested discovery in order to further examine the NLRB's motives in adding the single employer allegation. JA341, 356. The District Court, believing that it was constrained to "rubber stamp" the subpoenas, declined to allow discovery, contrary to well-settled law regarding enforcement of federal agency subpoenas. *See United States v. Cortese*, 614 F.2d 914, 931 n.12 (3d Cir. 1980) ("[I]n almost every case, the information needed to demonstrate an improper motive on the part of the [government] is in the hands of the government. Normally the [non-governmental party's] only access to such information is through limited basic discovery carefully tailored to the purposes of the inquiry. Accordingly, such discovery should be provided."); *NLRB v. Interstate Dress Carriers, Inc*., 610 F.2d 99, 113 (3d Cir. 1979) (explaining that if the party objecting to enforcement makes a "non-frivolous showing" that the NLRB's subpoena power is being used for the purpose of gathering information for another entity's investigation, the district court should defer enforcement "until completion of discovery of and hearing on that abuse of the subpoena power").

defense" in a judicial enforcement proceeding. *NLRB v. Frazier*, 966 F.2d 812, 819-20 (3d Cir. 1992) (citation omitted). An agency abuses the court's process where, as here, it "vigorously pursue[s] a charge because of the influence of a powerful third party without consciously and objectively evaluating the charge." *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125 n.9 (3d Cir. 1981). Moreover, as the District Court explained, the NLRB's view—that its motives are immune from judicial scrutiny—would "confine[]" Appellants to a "circular course" and negate the separation of powers required by Section 11(2) of the NLRA and the U.S. Constitution, leaving Appellants "without a judicial remedy under the law." JA68; *see also* Appellants' Br. at 17-22.[5]

Second, this Court should defer to the District Court's finding that the subpoenas seek irrelevant information because in fact many of the requests are irrelevant to the NLRB's single employer allegation. For example, the subpoenas

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[5] The NLRB cites two Board decisions for the proposition that the NLRB "defends the integrity of its administrative process . . . in *its own* proceedings." *See* NLRB Br. at 19 n.18 (emphasis in original). In those cases, the Board discussed its ability to control its own proceedings and to preserve the integrity of those proceedings, sanctioned the respondent for misconduct, and ordered the respondent to pay the Union's litigation expenses. *See Camelot Terrace*, 357 NLRB No. 161, at 1 (2011); *675 West End Owners Corp.*, 345 NLRB 324, 326 n.11 (2005). Those cases in no way support the NLRB's position that only the NLRB can review its own conduct. As explained above, that is a job for the District Court.

seek:

- "Copy of the policies of UPMC's Office of Ethics, Compliance and Audit Services." JA45.
- "Copies of documents showing the names and addresses of non-patient customers of UPMC Presbyterian Shadyside during the subject period." JA36.
- "Documents reflecting any applications filed by UPMC Presbyterian Shadyside for public funding of any of its operations." JA38.

Third, this Court should defer to the District Court's finding that—even after the ALJ revoked 31 requests[6]—the subpoenas are overly broad and unduly burdensome. The District Court found that "compliance with the three [subpoenas] . . . would be an extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of [Appellants]." JA29. Examples of the stunningly broad requests—each of which was made to both UPMC Presbyterian Shadyside and UPMC—include:

- "Copies of any and all advertisements used by UPMC Presbyterian Shadyside for the purpose of soliciting business for the subject period." JA38; 45 (identical request to UPMC).
- "Documents reflecting any advertisements used by UPMC Presbyterian Shadyside for the purpose of soliciting applicants for employment by UPMC Presbyterian Shadyside for the subject period." JA38; 45 (identical request to UPMC).

[6] Appellants' brief mistakenly stated that the ALJ revoked 29 requests.

- "Copies of documents showing the names and addresses of suppliers of UPMC Presbyterian Shadyside during the subject period." JA36; 43(identical request to UPMC).

In short, this Court should deny enforcement of the subpoenas, or, in the alternative, should it conclude that revised factual findings are necessary, the Court should remand to the District Court for it to properly discharge its judicial function and make more detailed factual findings.

CONCLUSION

For all these reasons, as well as those set forth in Appellants' opening brief, Appellants respectfully request that the Court reverse the judgment of the District Court and deny enforcement of the subpoenas or, in the alternative, remand the case to the District Court with instructions that it review the subpoenas in accordance with this Circuit's precedent.

Respectfully submitted,

/s/ Nancy Winkelman

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Dated: May 21, 2015

CERTIFICATE OF COMPLIANCE

I, Nancy Winkelman, certify:

Bar Membership. Paul Titus, Shannon L.C. Ammon, Jay Glunt, and I are members in good standing of the Bar of this Court.

Word Count. This brief complies with Federal Rule of Appellate Procedure 32(a)(7) and contains 2,533 words, as counted by Microsoft Office word-processing software.

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Electronic Filing. I prepared the electronic version of this brief in portable document format; it is identical to the paper version of the brief filed with the Court. I ran a virus scan on the electronic version of this brief using Symantec Anti-Virus Corporate Edition Version 10.6.52 software, and no virus was detected.

/s/ Nancy Winkelman
Nancy Winkelman

Dated: May 21, 2015

CERTIFICATE OF SERVICE

I, Nancy Winkelman, certify that on May 21, 2015, I caused Appellants' Reply Brief to be served on all counsel of record listed on the CM/ECF Service List.

/s/ Nancy Winkelman
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